No. 80-1451

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ALEXAND

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBBINS & MYERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that statements made in a speech delivered by petitioner's plant manager to assembled employees 24 hours before a representation election were sufficiently serious misrepresentations to justify setting aside the election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A2) is unreported. The supplemental decision and order of the National Labor Relations Board (Pet. App. A3-A14) are reported at 241 N.L.R.B. 102.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1980. The petition for a writ of certiorari was filed on February 25, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the petition (Pet. 2-4). Also relevant are the following provisions of the Act:

Section 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

In late 1973, the United Steelworkers of America, AFL-CIO-CLC, began an organizing drive at the petitioner's plant in Gallipolis, Ohio. The Union won the representation election held on February 21, 1974, but the Board set aside the election because of union misconduct. A second election was held on November 27, 1974, and the Union lost. Because of misconduct by petitioner, however, the Board ordered the second election set aside and directed that a third election be held. The third election, held on September 25, 1975, was won by the Union and the Board certified the Union as the employees' collective bargaining representative. (Pet. App. A4 n.1).

When petitioner refused the Union's subsequent request to bargain, the Union filed a charge with the Board alleging that the refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. A4 n.1). Petitioner defended its refusal to bargain by claiming, *inter alia*, that the Board had erred in setting aside the second election and that the Board's certification of the Union on the basis of the third election was therefore improper.

The Board set aside the second election under the principles established in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962), because it found that petitioner's plant

manager Hennessey had made material misrepresentations during a speech to the employees the day before the election (Pet. App. A3-A13).[1] While urging the employees to give petitioner one more year without the Union, Hennessey told them that (1) once they selected a union they would be "stuck with it" forever (Pet. App. A7), (2) employees would not be able to communicate directly with the Company (Pet. App. A9), and (3) only union members could work for petitioner (Pet. App. A11).

Under Section 9(c) of the Act, 29 U.S.C. 159(c), employees are guaranteed the right to decertify a union. The Board concluded (Pet. App. A8), therefore, that Hennessey's first statement was a significant "misrepresentation [that] could reasonably be expected to have had a significant impact on the election," especially since petitioner had urged that the "employees should give [petitioner] another year without the Union." The Board explained (*ibid.*):

> By misrepresenting the finality of the employees' selection of the Union as their representative, Respondent has unfairly distorted the consequences of making such a decision. Common sense dictates that an irreversible decision will be approached with greater caution. Any hesitation or reluctance to vote for union representation will naturally be increased when the risk of making that decision is exaggerated by the spectre of an unbreakable commitment. Similarly, presenting the

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[1]The Board initially set aside the second election because it found that petitioner had impliedly threatened the employees. In so ruling, the Board expressly reserved judgment on whether the election should also be set aside because of petitioner's misrepresentations. On review, the Sixth Circuit rejected the Board's finding of implied threats and remanded for consideration of the petitioner's alleged misrepresentations. *Robbins & Myers, Inc.* v. *NLRB*, 577 F. 2d 382 (1978), remanding 226 N.L.R.B. 544 (1976). It is the Board's decision on remand that is the subject of this case.

> decision to vote for union representation as irreversible also affects the employees' ability to evaluate other election propaganda. Employer suggestions as to the deficiencies of union representation which otherwise might be dismissed in light of the opportunity to later oust the union if those allegations prove to be true are not so easily disregarded when that opportunity does not exist.
>
> * * * This appeal is clearly more attractive in the context of the distorted picture of the alternatives that Respondent had presented to the employees: one more year with management or forever with the Union.

The second statement misrepresented the employees' right to present individual grievances to their employer without the intervention of their union as guaranteed by Section 9(a) of the Act. The Board explained why this misrepresentation could have had a serious impact on the election (Pet. App. A10-A11):

> By its very nature, a representation election involves the decision whether to sacrifice certain individual rights and interests in favor of collective action and representation by a union. Certainly the extent to which the Act has preserved the rights of individual employees even after a union has been selected is a matter of great concern to the employees in the process of making that decision. Thus, Respondent's misrepresentation impacts directly on the employees' evaluation of an important consideration in the election by erroneously exaggerating the extent to which the employees lose their individual rights to the collective representative.

The third misrepresentation informed employees that only union members would be employed at petitioner's plant if the Union prevailed. The Board rejected petitioner's

assertion that this language merely referred to "a permissible union-security provision" (Pet. App. A11). The Board explained (Pet. App. A11-A12; footnote omitted):

> Contrary to [petitioner's] characterization, however, the statement in this case went beyond merely referring to a permissible union-security provision as a closed shop. Hennessey's statement warns clearly that only union people will be employed by [petitioner] under the closed shop. Of course, this representation is substantially incorrect in two important respects. First, new employees need not be union members and are entitled to a 30-day grace period before being required to pay any dues or fees. Second, all employees are only required to meet their financial core obligations and need not become members of the Union.

The Board found that the cumulative effect of these misrepresentations by top management immediately before the election, when the Union had no opportunity to reply, was impermissibly to "distort[ ] the consequences of voting for the Union" (Pet. App. A12). The Board explained (Pet. App. A12-A13):

> The employees were left with the impression that a vote for a union is irreversible, that once a union is selected the employees are excluded from contact with the employer, and that the employees' job security is dependent on full union membership and thus is subject to union discipline.

Accordingly, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Pet. App. A13) and ordered petitioner to bargain with the Union (*ibid.*).

The court of appeals, in a per curiam order, enforced the Board's order, finding that "substantial evidence" supported the Board's finding that Hennessey's speech "con-

tained substantial misrepresentations reasonably expected to have a significant impact on the election. * * *" (Pet. App. A1-A2).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decisions of this Court or of the other courts of appeals.

Petitioner contends that the Board's decision requires an employer that discusses employee rights during an organizing campaign to "present[ ] a detailed discussion of all arguably related statutory rights and benefits provided under the Act" (Pet. 7). The Board set aside the second election, however, not because petitioner failed to give a complete and detailed discussion of employee rights under the Act, but because it misrepresented the statutory rights that it chose to discuss. The cases relied on by petitioner (Pet. 7-8) do not support its contention that such misrepresentations are privileged under Section 8(c) of the Act.[2]

There is no merit in petitioner's further contention (Pet. 10-11) that its statement that unionized employees lose all right to communicate with their employer is consistent with the holdings in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), and *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 61 n.12 (1975). The statement quoted from *Allis-Chalmers* (Pet. 10) concerns the bargaining representative's exclusive right to

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[2]Neither *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966), nor *National Association of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), provides any support for petitioner in this case. In both cases the Court only considered the extent to which federal labor law limited the application of state libel and slander laws. The language petitioner cites (Pet. 8) from *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), deals not with election misrepresentations, but with the standards for evaluating whether employer statements are coercive and therefore violative of Section 8(a)(1) of the Act.

bargain about the grievance processing mechanism and not with the employees' independent right under Section 9(a) of the Act to present grievances to their employer. The statement quoted from *Emporium* (Pet. 10-11) explains that an employer may refuse to entertain an employee's individual grievance presentation; it does not stand for the proposition that unionization limits the right of the employee to present, or the employer to entertain, individual grievances.[3]

Contrary to petitioner's assertion (Pet. 12-13), the court's decision here does not conflict with *Melrose-Wakefield Hospital Ass'n* v. *NLRB*, 615 F. 2d 563 (1st Cir. 1980). There the court agreed with the Board that the employer's "multiple inadequate objections" could not be aggregated

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[3]As the Board noted (Pet. App. A9-A10 n.7), the cases cited by petitioner (Pet. 11 nn.4, 5) deal with the question whether the employer violated Section 8(a)(1) of the Act by threatening to refuse to entertain grievances presented by individual employees, not with whether it is a misrepresentation to tell employees they have no right to approach their employer if unionized.

Similarly, the Board explained (Pet. App. A11 n.8) that, in *Pollock Mill Co.*, 104 N.L.R.B. 227 (1953) (Pet. 11 n.6), the employer "merely referr[ed] to a permissible union-security provision as a closed shop" but did not, as here, distort what such a provision entailed. In *Big "D" Mining*, 222 N.L.R.B. 522, 523 (1976) (Pet. 12 n.7), the Board found that the employer's description of the union-security clause contained in the union's national constitution was not so misleading as to warrant setting aside the election. In *Montana Lumber Sales Inc.*, 185 N.L.R.B. 46, 49 (1970) (Pet. 12 n.7), the Board found no substantial misrepresentation in the employer's description of the effect of a union-security clause. And, in *Edward A. Utlaut Memorial Hospital*, 249 N.L.R.B 1153, 1158 (1980) (Pet. 12 n.7), the Board, citing the instant case, found a misrepresentation about joining the union to be a valid objection to the results of the election.

The Board (Pet. App. A8 n.6) also distinguished, on its facts, *Northlake Convalescent Home*, 173 N.L.R.B. 992 (1968) (Pet. 9-10). There the employer's remark was tied to the finality of a vote, stating that an employee could not "withdraw or change" the way he voted. In that context the Board found the employer's statement that "once you vote, you will have had your only chance to assert the personal freedom which you now enjoy" to be "ambiguous."

to provide sufficient grounds to set aside the election (*id.* at 570). Moreover, the court in *Melrose-Wakefield* acknowledged that "the Board can conclude * * * that a 'systematic pattern of activity', involving misrepresentations or coercion, requires invalidation of an election even when no single act so requires" (*ibid.*; citation omitted). Here, the court sustained the Board's finding that each of petitioner's statements was a "serious misrepresentation[]" (Pet. App. A1).

In sum, the only question presented in this case is whether the Board properly concluded that petitioner's misrepresentations could "reasonably be expected to have a significant impact on the election." *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962).[4] That issue, which turns on the particular facts here, does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the facts of this case make plain, the Board's conclusion was reasonable.

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[4]In *Hollywood Ceramics*, the Board explained that, in determining whether the permissible limits of campaign propaganda had been exceeded, it would consider such criteria as: (1) whether there is a misrepresentation of a material fact involving a substantial departure from the truth; (2) whether the other party had an opportunity to make an effective reply; (3) whether the misrepresentation comes from a party who has special knowledge of, or was in position to know, the true facts; and (4) whether the misrepresentation relates to matters within the independent knowledge of the employees so that they are able effectively to evaluate the propaganda. 140 N.L.R.B. at 224.

Petitioner does not challenge the application of the *Hollywood Ceramics* test here. Petitioner misstates the test, however, when it asserts (Pet. 13-14) that it requires that an election be set aside only if the alleged misrepresentation relates to matters exclusively within the knowledge of the party making the statement. That is only one factor the Board considers in assessing the employees' ability to evaluate independently the truth of campaign statements (140 N.L.R.B. at 244 n.10). Here, the record provides no basis for concluding that the employees had independent knowledge that would have allowed them to evaluate petitioner's erroneous statements about their rights under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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